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IN THE SUPREME COURT OF THE UNITED STATES

No: 79-5688

TRACY LEE HUDSON, PETITIONER,

vs.

STATE OF LOUISIANA, RESPONDENT.

MOTION FOR LEAVE TO PROCEED WITH PETITION
FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

Comes now the petitioner, Tracy Lee Hudson, by and through his attorney of record, Richard Otto Burst, Sr., and moves this Court for permission to proceed with Petition for Writ of Certiorari in the Supreme Court of the United States from the judgment of the Supreme Court of the State of Louisiana affirming the judgment of the District Court denying petitioner the relief sought therein on his habeas corpus application.

In support of this motion, attached hereto is a properly notarized Affidavit of Poverty in compliance with 28 U.S.C., Sec. 1915.

TRACY LEE HUDSON, PETITIONER

By: _____
Richard Otto Burst, Sr., Attorney
for Petitioner
Burst & Dewart, Attorneys, Inc.
209 E. Oklahoma, P.O. Box 578
Guthrie, Oklahoma 73044

AFFIDAVIT OF POVERTY

STATE OF LOUISIANA)
) SS:
PARISH OF WEST FELICIANA)

I, Tracy Lee Hudson, being first duly sworn, depose and say that I am the petitioner in the above entitled case and I am a citizen of the United States; that in support of my motion to proceed with petition for writ of certiorari in the Supreme Court of the United States from the

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STATE OF LOUISIANA)
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I, Tracy Lee Hudson, being first duly sworn, depose and say that I am the petitioner in the above entitled case and I am a citizen of the United States; that in support of my motion to proceed with petition for writ of certiorari in the Supreme Court of the United States from the judgment of the Supreme Court of the State of Louisiana without being required to prepay fees, costs, give security thereof, I state that because of my poverty that I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress, and that the issue which I desire to present on appeal is as follows:

Whether or not the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered by the trial judge on a motion for new trial, for the reason as stated by the trial judge as follows, to-wit:

> "In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim." (Transcript of Motion for New Trial, page 12, lines 20 through 25.)

That I believe that I am entitled to redress for the further reason that the sub-issue which I desire to present on appeal is as follows:

Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution applies to the State of Louisiana only if there is a finding of no evidence by the trial judge or if the double jeopardy clause of the Fifth Amendment applies to the State of Louisiana if there is a finding of insufficient evidence.

Further, I am presently in custody at the State Penitentiary, Angola, Louisiana, under the judgment and sentence issued by the District Court of Bossier Parish, Louisiana; that I have been in continuous custody since December of 1976 when I was first arrested on this charge, having been incarcerated at the Parish Jail, Bossier Parish, Louisiana, until after denial of my writ of habeas corpus in November of 1978.

I have during the past two and one-half years of incarceration received no income. I do not have any business, profession or other source of income at the present time. I do not own any cash other than a small amount provided me by my parents periodically for spending; I do not have a checking or savings account nor do I own any stocks, bonds or other valuable property. I do not now own an automobile. I do not own or have any interest in any real property. The automobile I did own when charged with this offense was sold to provide fees for payment of my attorneys through the first trial on the merits, which was reversed by the trial court upon motion for new trial, for the reasons stated; I was provided court-appointed counsel subsequent to the motion for new trial.

I further believe in good faith, that I am entitled to the relief I am seeking, understanding that a false statement to the answer of any of the questions in this Affidavit will subject me to penalties for perjury and further swear that the responses which I have made in this Affidavit relating to my ability to pay the costs of prosecuting the petition for writ of certiorari are true and correct. I therefore request leave to prosecute the proposed petition for writ of certiorari in forma pauperis.

Tracy Lee Hudson

Tracy Lee Hudson

Tracy Lee Hudson, being first duly sworn on his oath presents that he has subscribed to the above and does state that the information contained therein is true and correct to the best of his knowledge and belief.

Tracy Lee Hudson

Tracy Lee Hudson

Subscribed and sworn to before me this 26 day of July, 1979.

Notary Public

My commisson expires:

N/A

(Date commission expires)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5688

TRACY LEE HUDSON, Petitioner,

VERSUS

THE STATE OF LOUISIANA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW

A JUDGMENT OF THE SUPREME COURT OF LOUISIANA

RICHARD OTTO BURST, SR. of
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NOVEMBER, 1979

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AUTHORITIES

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VERSUS

THE STATE OF LOUISIANA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW
A JUDGMENT OF THE SUPREME COURT OF LOUISIANA

Comes now the petitioner and respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Louisiana issued on June 25, 1979, rehearing denied on September 4, 1979, in the State of Louisiana versus Tracy Lee Hudson, Case No. 63,450.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana was rendered on the 25th day of June, 1979 (Appendix A); a dissenting opinion was filed on June 27, 1979 (Appendix B). An Application For Rehearing was timely filed; the Court denied the Application For Rehearing on September 4, 1979, in a four to three decision (Appendix C).

The opinion of the Supreme Court of Louisiana affirmed the ruling of the Honorable Cecil C. Lowe, Judge, of the Twenty-Sixth Judicial District Court, Parish of Bossier, Louisiana, in the case filed State of Louisiana vs. Tracy Lee Hudson, numbered 54,929. Judge Lowe, therein,

denied petitioner's writ of habeas corpus, timely filed, under Louisiana law, wherein petitioner had alleged that the "sustaining of motion for new trial on insufficiency of evidence is bar to further prosecution for the same offense under the Fifth Amendment double jeopardy clause".

JURISDICTION

The opinion filed on June 25, 1979, which became final upon denial of rehearing on September 4, 1979, is now presented for review. The Petition for Certiorari was filed within ninety (90) days of the date the Supreme Court of Louisiana denied the Application For Rehearing. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 (2) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

1. Whether or not the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered solely for lack of sufficient evidence to sustain the jury's verdict.

2. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution applies to the State of Louisiana only if there is a finding of no evidence by the trial judge or if the double jeopardy clause of the Fifth Amendment applies to the State of Louisiana if there is a finding of insufficient evidence.

STATUTORY PROVISIONS CITED

LSA-C. Cr. P. art. 851 provides:

> "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> "'The Court, on motion of the defendant, shall grant a new trial whenever:

"'(1) The verdict is contrary to the law and the evidence, or

"'(2) The Court is of the opinion that the ends of justice would be better served by the granting of a new trial although the defendant may not be entitled to a new trial as a matter of strict legal right."

STATEMENT

On January 4, 1977, Tracy Lee Hudson, hereinafter referred to as "petitioner", was charged with first degree murder in the District Court in and for the Twenty-Sixth Judicial District, Parish of Bossier, Louisiana, Criminal Docket No. 54,924; on March 2, 1977, petitioner was found guilty by a jury; on March 7, 1977, the Honorable Enos C. McClendon sustained a motion for new trial on the sole ground that the evidence presented by the State was insufficient to sustain the verdict of guilty.

Judge McClendon reasoned:

"In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim." (First Footnote to Louisiana Supreme Court opinion, [appendix A attached hereto], and motion for new trial transcript, page 12, lines 20 through 25.)

The Supreme Court of Louisiana upheld that decision. State v. Hudson, 344 So.2d. 1 (1977)

Petitioner was retried and found guilty on September 30, 1977. At the re-trial the State, for the first time, introduced an eye witness who stated he had viewed petitioner stabbing the victim; on cross-examination the supposed eye witness testified that he told the police at the death scene that he had observed the whole thing, but his name got lost somewhere, (Second trial transcript, page 215, lines 8 through 13.) until about a month before the second trial. (Second trial transcript, page 213, lines 21 through 27.)

It should be noted that the supposed eye witness was at a location removed from the stabbing incident until two young girls (also State witnesses) went to ". . . call the police and send an ambulance. . . "

(Second trial transcript, page 171, lines 16 through 18), or " . . . call the cops. . . ." (Second trial transcript, page 176, line 15); the prior statement being a voluntary response to cross-examination; the latter being a response to re-direct examination. The testimony of the two girls is confusing but it is important in that if the sequence of events is that the girls went to call an ambulance to assist the stabbing victim, that the supposed eye witness would not have been in a location to see the victim stabbed until after the stabbing occurred; this is so because the young girls advised the supposed eye witness of the incident when they went to call the police and send an ambulance, or call the cops. The girls had not viewed a stabbing, but had happened back on the scene and observed the victim lying in the trailer adjacent to the driveway where an argument had been witnessed by them between the victim and the defendant.

The immediately foregoing sequence of event is not directly in point on the issue herein presented, but is set forth to underscore the type and nature of testimony that develops to support a second trial when the first is overturned for insufficient evidence; that is, in the opinion of the writer, testimony of dubious trustworthiness and credibility based upon conflict between the eye witness testimony and the testimony of the other State witnesses, and on the extremely doubtful and unlikely occurrence of an eye witness advising the police at a murder scene that he had witnessed the whole thing in a community where murder is not that frequent and the police losing his name until a second trial nine months later.

It should be noted that the defendant denies, denied in the first trial and denied in the second trial, and has at all times denied that he committed the stabbing.

On June 19, 1978, the Supreme Court of Louisiana issued Opinion No. 61385 affirming the second conviction; on August 31, 1978, a re-hearing was refused.

On June 14, 1978, Burks v. United States, 98 S.Ct. 2141, was issued by this Court holding that as a matter of substantive constitutional law, the double jeopardy clause of the Fifth Amendment prohibits the retrial of a defendant when his original trial was overturned for insufficient evidence.

On October 2, 1978, based on Burks, supra, a Writ of Habeas Corpus was filed on behalf of petitioner; under Louisiana law, such issue of former jeopardy was timely raised by such Writ; the timeliness was not an issue below and therefore is not an issue herein. On November 13, 1978, the Writ was denied by the Honorable Cecil C. Lowe, Judge, Twenty-Sixth Judicial District, Bossier Parish, Louisiana.

Writ of Certiorari was accepted by the Supreme Court of Louisiana, oral argument held, and the Writ was denied by order entered June 25, 1979 with one justice dissenting; rehearing was denied by order filed September 4, 1979, with three of seven justices stating they would grant a rehearing.

From such denial of rehearing, petitioner has timely requested this Court to accept Writ of Certiorari to the Supreme Court of the State of Louisiana.

REASONS FOR GRANTING THE WRIT

In In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, _____ L.Ed.2d _____ (1970), this Court stated:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". (1073)

In Jackson v. Virginia, _____ U.S. _____, 99 S. Ct. 2781, _____ L.Ed.2d (1979), this Court stated:

> "This is the first of our cases to expressly consider the question whether the due process standard recognized in Winship constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." (2786)

The petitioner in Jackson was seeking Federal Habeas Corpus review of his case based on a claim that he had been convicted in a state court upon insufficient evidence; the question presented was what standard to apply. This Court answered the question thusly:

> "We hold that in a challenge to a state criminal conviction brought under 28 U.S.C., Sec. 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilty beyond a reasonable doubt". (2792)

This Court, in Jackson, specifically rejected the "no evidence" rule of Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (19__) as ". . . inadequate to protect against misapplications of the constitutional standard of reasonable doubt. . . ." (2790)

The case at bar presents a much stronger posture in that the trial court actually sustained a Motion For New Trial solely on the ground on insufficient evidence. The trial judge reasoned:

> "In the present case, I heard the same evidence the jury did, I am convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of a homicide committed by the defendant of this particular victim." (See Footnote 1 of Appendix A attached hereto.)

Thus, in the instant case, the question is not whether or not the evidence was insufficient, but is whether or not a finding of insufficient evidence made by the trial court on Motion for New Trial precludes a second trial.

The case of Burks v. United States, ___ U.S. _____, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), was cited to the Supreme Court of Louisiana in support of the proposition that the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's verdict has been set aside and a new trial ordered solely for lack of sufficient evidence to sustain the jury's verdict. In its opinion, Appendix A attached hereto, the Supreme Court of Louisiana in the first three and one-half pages, seemed to agree with the position of petitioner; however, about half way into the fourth page of the opinion, the Court began to discuss the difference in procedural application by the State of Louisiana to the questions of "no evidence" of the crime charged as opposed to "insufficient evidence".

The Court therein then set forth:

> "The question in the instant case is whether Burks compels the same result where the trial judge grants a motion for new trial on the grounds of insufficient evidence as opposed to granting the motion on the grounds of no evidence. We believe it does not." (Appendix A, page 5.)

The Louisiana Supreme Court then interpreted a quotation from Burks, as follows:

> ". . . we believe the holding in Burks (precluding a second trial) is limited to those cases where, as a matter of law, a reviewing court has determined that in a prior trial there was no evidence of the crime charged or an essential element thereof."

The issue is then clear. The Supreme Court of Louisiana has in its opinion stated that the sustaining of a motion for new trial solely for lack of sufficient evidence to sustain the jury's verdict grants the State a second chance to muster new evidence, but that a holding of no evidence of the crime charged or an essential element thereof would preclude a new trial in the State of Louisiana.

CONCLUSION

Petitioner respectfully submits that the opinion handed down and filed on June 25, 1979, rehearing denied on September 4, 1979, by the Louisiana Supreme Court has applied the Fifth Amendment double jeopardy clause in a manner not in accord with the applicable decisions of this Court. namely, Burks, Jackson, and In Re Winship, supra. Petitioner further submits that the opinion of the Louisiana Supreme Court ignores the clear ruling of the trial court ". . . that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide . . .", and that when the trial court so ruled that the cause for murder against petitioner was at an end, and that in accordance with the dissent of Justice Dennis, Appendix B attached hereto, this Petitioner's conviction should be reversed and set aside and Petitioner ordered discharged.

Therefore, for the reasons set forth above, Petitioner respectfully urges that the Writ of Certiorari be granted.

Respectfully submitted,

RICHARD OTTO BURST, SR., of
Burst & Dewart, Attorneys, Inc.
209 E. Oklahoma, P.O. Box 578
Guthrie, Oklahoma 73044
(405) 282-6936
Attorney for Petitioner

November, 1979.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was served upon the following parties, by mailing such true and correct copies, postage prepaid, this 21st day of November, 1979.

Henry N. Brown, Jr.
District Attorney in and for Twenty-Sixth Judicial
District of Louisiana
Bossier Parish Courthouse
Benton, Louisiana 71006

William J. Guste, Jr., Attorney General
for State of Louisiana
State Capitol Building
Baton Rouge, Louisiana 70804

Supreme Court of State of Louisiana
301 Loyola Avenue
New Orleans, Louisiana 70112

RICHARD OTTO BURST, SR.

SUPREME COURT OF LOUISIANA

JUN 25 1979

STATE OF LOUISIANA

VS.

NUMBER 63,450

TRACY LEE HUDSON

ON WRIT OF CERTIORARI TO THE TWENTY-SIXTH JUDICIAL DISTRICT COURT, PARISH OF BOSSIER, HONORABLE CECIL C. LOWE, JUDGE.

* * *

BLANCHE, Justice.

The issue presented is whether the double jeopardy clause of the Fifth Amendment precludes a second trial after a jury's guilty verdict has been set aside and a new trial ordered pursuant to LSA-C.Cr.P.art. 851 solely for lack of sufficient evidence to sustain the jury's verdict.

Petitioner, Tracy Lee Hudson, was convicted by a jury of first degree murder, LSA-R.S. 14:30, and sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. Pursuant to his duty to pass upon the sufficiency of the evidence, State v. Daspit, 167 La. 53, 118 So.690 (1928); LSA-C.Cr.P. art. 851, Official Revision Comment (d); the trial judge granted petitioner's motion for a new trial upon finding insufficient evidence to support the verdict returned by the jury.[1] The granting or the refusal to grant a new trial is unreviewable by this Court, except for error of law. LSA-C.Cr.P. art. 858. Accordingly, the State's application for review erroneously asserting that the district

	APPROVE	DISSENT	CONCUR	OTHER
S				
T				
D.A.				
C				
M				
Dep.				
B				

1. In his Oral Reasons for Judgment, the trial judge stated:

"In the present case, I heard the same evidence the jury did, I'm convinced that there was no evidence, certainly not evidence beyond a reasonable doubt, to sustain the verdict of homicide committed by the defendant of this particular victim."

APPENDIX "A"

court may pass only upon whether there is "some evidence" was denied. 344 So.2d 1 (La.1977) Upon retrial the State introduced additional evidence, in particular an eye witness to the murder who had not been produced at the original trial. The petitioner was convicted by a jury of first degree murder for the second time and resentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. On appeal, the conviction and sentence were affirmed. 361 So.2d 858 (La.1978)

On October 2, 1978, petitioner applied for habeas corpus relief in the district court, alleging for the first time that the second trial in this case placed him in jeopardy a second time for the same offense in violation of the double jeopardy clause of the Fifth Amendment. The trial court denied relief, and petitioner applied to this Court. We granted petitioner's application to consider his plea of double jeopardy.

In Burks v. United States, __ U.S. ___, 98 S.Ct. 2141, 57 L.Ed2d 1 (1978), the United States Supreme Court announced that the double jeopardy clause of the Fifth Amendment precluded a second trial when a defendant's conviction is reversed by a reviewing court solely for lack of sufficient evidence to sustain the jury's verdict. In Burks, the defendant was convicted of bank robbery in federal district court and the trial judge denied his motion for new trial. On appeal, the defendant claimed that he had successfully established a prima facie defense of insanity through the testimony of three expert witnesses and the Government had failed to meet its burden of coming forward and proving sanity beyond a reasonable doubt. The Supreme Court observed:

> "... [T]he reviewing court went on to hold that the United States had not fulfilled its burden since the prosecution's evidence with respect to Burks' mental condition, even when viewed in the light most favorable to the Government, did not 'effectively rebut' petitioner's proof with respect to insanity

and criminal responsibility. In particular, the witnesses presented by the prosecution failed to 'express definite opinions on the precise questions which this court [of appeals] has identified as critical in cases involving the issue of [in]sanity.'" (98 S.Ct. at 2143--Empnasis added)

The court of appeal remanded the case to the district court, directing that court to enter a verdict of acquittal unless the State was able to present sufficient additional evidence to carry its burden. The defendant sought relief on double jeopardy grounds.

The Supreme Court in Burks held that a second trial would normally be permitted after a conviction had been reversed due to trial error, but that the double jeopardy clause prohibited a second trial after a conviction had been reversed fue to failure of proof. The Court explained the rationale for this distinction as follows:

"... In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U.Chi.L.Rev. 365, 370 (1964).

"The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. ... Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (98 S.Ct. at 2149-2150)

In precluding a second trial when a defendant's conviction has been overturned due to failure of proof at trial, the high

court expressly declined to follow prior jurisprudence which found a "waiver" of the double jeopardy guarantee whenever the defendant sought a new trial as one of his remedies in the trial court:

> "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial. ... To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." (98 S.Ct. at 2150)

The double jeopardy protection of the Fifth Amendment is applicable to state criminal proceedings through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed2d 707 (1969); State v. Thompson, 366 So.2d 1291 (La. 1978).

While the case at bar involves the granting of a motion for new trial by the trial court for insufficient evidence rather than review at the appellate level, we deem the same principles are applicable to both.

LSA-C.Cr.P. art. 851 provides:

> "The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> "The court, on motion of the defendant, shall grant a new trial whenever:
>
> "(1) The verdict is contrary to the law and the evidence ...."

This provision permits the trial judge to grant a defendant a new trial if, in his opinion, the evidence is insufficient to convict. State v. Rollins, 351 So.2d 470 (La.1977); State v. Jack, 332 So.2d 464 (La.1976); State v. Jones, 288 So.2d 48 (La.1974). This Court's appellate jurisdiction in criminal matters extends only to questions of law, LSA-Const. Art. 5, § 5 (c), and it is only where a defendant has moved for a judgment

of acquittal in a trial before a judge alone (LSA-C.Cr.P. art. 778) or for a new trial based upon the contention that there is no evidence at all of the crime charged or an essential element thereof, is a question of law presented which this Court can review. State v. Cobbs, 350 So.2d 168 (La.1977); State v. Blacksline, 347 So.2d 193 (La.1977); State v. Jamerson, 341 So.2d 1118 (La.1977).

This Court has recognized that when it finds on review that in a prior trial there was no evidence of the crime charged or an essential element thereof, Burks precludes retrial, and a verdict of acquittal must be entered. State v. Thompson, 366 So.2d 1291 (La.1978); State v. Allien, 366 So.2d 1308 (La.1978); State v. Liggett, 363 So.2d 1184 (La. 1978). In State v. Thompson, supra, we noted that the Supreme Court indicated that the contention that there was no evidence of the crime charged or an essential element thereof may properly be raised solely by a motion for new trial. State v. Thompson, supra at 1293-94. Thus, if a trial judge granted a motion for new trial on the grounds that no evidence of the crime chargedor an essential element thereof, Burks, supra, and our holding in Thompson, supra, would require the trial judge to enter a verdict of acquittal.

The question in the instant case is whether Burks compels the same result where the trial judge grants a motion for new trial on the grounds of insufficient evidence as opposed to granting the motion on the grounds of no evidence. We believe it does not.

We believe the holding in Burks was addressed solely to those cases where a reviewing court (whether it be the trial judge or an appellate court) finds that as a matter of law, there was a failure of proof at the trial level. The Court, in Burks, explained:

> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. ... Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury." (98 S.Ct. at 2149-2150--Emphasis added)

Interpreting this language in light of this State's rules regarding appellate review of evidence presented in criminal matters, we believe the holding in Burks (precluding a second trial) is limited to those cases where, as a matter of law, a reviewing court has determined that in a prior trial there was no evidence of the crime charged or an essential element thereof.

We are buttressed in this conclusion by what we feel was an attempt by the Court to narrow its holding in Burks:

> "... The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury finding the defendant guilty beyond a reasonable doubt. [Citations omitted] ... While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. ..." (98 S.Ct. at 2150)

Because the trial judge herein ordered a new trial pursuant to LSA-C.Cr.P. art. 851 (1) solely for lack of sufficient evidence to sustain the jury's verdict (a factual determination entrusted exclusively to the trial judge under our law and jurisprudence), we hold that retrial of the defendant was not precluded by the double jeopardy clause.

DECREE

For the above and foregoing reasons, the judgment of the district court denying relator relief on his habeas corpus application is affirmed.

AFFIRMED.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus

No. 63,450

TRACY LEE HUDSON

* * *

Concurring Opinion

TATE, Justice.

I fully concur in the holding of the majority.

Although Burks v. United States, _____ U.S. _____, 98 S.Ct. 2141 (1978), has language that without close analysis seems to require upholding the double jeopardy plea, in my opinion the majority has correctly concluded that its rationale and holding are not applicable to the present situation.

Here, the record of the first trial shows that the state produced evidence sufficient to present the jury the question of the defendant's guilt of the crime. We would not have held, on appeal, that the evidence in that record was so insufficient as to constitute no evidence of the crime, so as to justify our setting aside the verdict of guilty.

Nevertheless, the trial judge was not completely satisfied that the accused's guilt was proved beyond a reasonable doubt. He did not grant a new trial for a reason that he did not think the state had produced sufficient evidence to prove guilt, but rather because he himself (to satisfy his doubts-- not the jury's, which had concluded otherwise) had personal doubts that the evidence was sufficient to prove guilt beyond a reasonable doubt. Commendably and conscientiously, he therefore ordered a new trial; otherwise, the sufficiency of the evidence would not have been reviewable by this court, despite his own doubts that the defendant's guilt was sufficiently proved.

The present is not an instance where the state did not prove its case at the first trial, so that granting a new trial gave the state a second chance to produce enough evidence to convict the accused. If so, as the majority notes, re-trial offends constitutional double jeopardy.

Rather, this is an instance where the state produced enough evidence to convict the accused at the first trial, but nevertheless the conscientious trial judge was troubled by a doubt concerning the defendant's actual guilt. In ordering the new trial, he did so to protect the accused (his denial of the new trial would have been unreviewable under our jurisprudence, since "some" evidence sufficient to support a verdict of guilt had been introduced).

In reality, the trial judge's reason for granting the new trial is better expressed by his authorization to do so whenever "the court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right," La.C.Cr.P. art. 851(5). Under these circumstances, I do not believe that Burks requires us to hold that double jeopardy is occasioned by a new trial granted for such reason.

I therefore respectfully concur.

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JUN 27 1979

SUPREME COURT OF LOUISIANA

NO. 63,450

STATE OF LOUISIANA

VERSUS

TRACY LEE HUDSON

DENNIS, Justice, dissenting.

I respectfully dissent.

Although the Supreme Court in Burks v. United States, ____U.S.____, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) was not confronted with a case in the exact posture as the instant proceeding it is clear that the constitutional principles expounded there are applicable here. The high court flatly stated that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Id., 98 S.Ct. at 2147, 57 L.Ed.2d at 9. The Court's opinion provides no basis for limiting its holding to cases in which a reviewing court has set aside a conviction for evidentiary insufficiency. On the contrary, the Court supported its decision by pointing out that reversal for insufficient evidence should be treated the same whether made by the trial court or the reviewing court:

> "[I]t should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient . . . . To hold otherwise would

> create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." Id., 98 S.Ct. at 2147, 57 L.Ed.2d at 9.

Moreover, in a companion case, United States v. Scott, ____U.S.____, 98 S.Ct. 2187, 2196-97, 57 L.Ed.2d 65, 77-78 (1978), the Supreme Court made it clear that the question of whether a trial court's ruling is to be treated as an acquittal for purposes of double jeopardy is not to be determined by the judge's own characterization of his action. The Court in Scott relied on United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), in which the Court made the following statement:

> "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. [citations omitted] Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."

Therefore, as I read Burks, Scott and Martin Linen, the double jeopardy clause has now been interpreted so as to prohibit a reprosecution of a defendant after a determination, by either a trial or appellate court, that the evidence introduced at trial was insufficient to sustain the verdict, regardless of the label placed on the motion and ruling by the defendant or the trial judge.

Additional support for this view may be found in the following language quoted with approvel in the recent United States Supreme Court decision in Greene v. Massey, ____U.S.____, 98 S.Ct.____, 57 L.Ed.2d 15, 20 (1978):

> "'Regardless of whether an appellate court or a trial jury makes the determination that the evidence is insufficient to sustain a finding of guilt

> as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of the evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance.'"

There appears to be no better reason for allowing the prosecution to retry such a case as the present one than there is to allow the prosecution, for example, to retry a defendant after discharging the jury upon discovering that it has insufficient evidence because of the absence of witnesses. See Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1965); Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

Although it is not stated explicitly in any of the Supreme Court's recent opinions, their total effect apparently eliminates the possibility that a defendant may merely be granted a new trial upon a finding of evidentiary insufficiency and requires that a judgment of acquittal be entered instead. This result appears, moreover, to be consistent with the purpose underlying the prohibition against double jeopardy, as stated, for example, by the Supreme Court in Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id., 355 U.S. 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199.

For the foregoing reasons, defendant's conviction should be reversed and set aside and the defendant ordered discharged.

SEP 4 1979

SUPREME COURT OF LOUISIANA

NO. 63,450

STATE OF LOUISIANA

VS

TRACY LEE HUDSON

ON WRIT OF CERTIORARI TO THE
TWENTY-SIXTH JUDICIAL DISTRICT COURT
PARISH OF BOSSIER
HONORABLE CECIL C. LOWE, JUDGE

On Application for Rehearing

Denied.

FWS

AT JR

WFM

FAB

Dixon, Calogero and Dennis, J.J., would grant a rehearing.

SUPREME COURT OF LOUISIANA
A TRUE COPY

Fraps J. Labranche, Jr.
Clerk of Court